Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

CATHERINE INGLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in exempting any "generally applicable" state-law rule from preemption under the Federal Arbitration Act, contrary to other federal and state courts that have held such rules preempted when selectively applied to invalidate arbitration agreements.

STATEMENT OF THE PARTIES AND AFFILIATES

Circuit City Stores, Inc. has no parent company and no publicly held company owns 10% or more of the corporation's stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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CIRCUIT CITY STORES, INC.,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINION BELOW

The opinion of the Ninth Circuit (App. 2a-25a) is reported at 328 F.3d 1165 (9th Cir. 2003). The opinion of the district court (App. 28a) is unpublished.

[1] Circuit City also is simultaneously filing a petition for a writ of certiorari in *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003), which raises the same question presented. For the reasons explained in the *Mantor* petition, this Court should grant both petitions or, in the alternative, grant the petition in the present case and hold the petition in *Mantor*.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 13, 2003. A petition for rehearing was denied on July 8, 2003. On September 29, 2003, Justice O'Connor granted Petitioner's application for an extension of time to file a petition for a writ of certiorari until October 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(C)

Because the proceeding draws into question the constitutionality of California's law of unconscionability, as codified in Cal. Civ. Code § 1670.5[2] and as applied in this case, and neither the State nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(b) may apply. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(b), certified to the Attorney General of California the fact that the constitutionality of such California statute has been drawn into question.

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[2] Cal. Civ. Code § 1670.5 provides:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides in pertinent part:

> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

This petition seeks review of a Ninth Circuit decision invalidating an arbitration agreement under California's law of unconscionability. The question presented, however, is one of federal law, not state law. Federal law – specifically § 2 of the Federal Arbitration Act ("FAA" or "Act") – governs this case, and prohibits using state-law doctrines like the one applied below to invalidate arbitration agreements.

The decision below applies state unconscionability law in a way that is demonstrably hostile to arbitration, using it to fashion a new rule under which employment arbitration agreements are presumptively unenforceable. That decision is contrary to the terms and purpose of § 2, and in conflict with holdings of other courts. If allowed to stand, it will render meaningless many of this Court's decisions endorsing the use of arbitration in the employment context. This Court should grant review to resolve the conflict among the lower

courts, preserve the vitality of its own decisions, and enforce the FAA and its pro-arbitration policy.

A. Statutory Background

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, was enacted in 1925 to overcome longstanding judicial hostility toward arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 n.6 (1985). The FAA establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," this Court "rigorously enforce[s] agreements to arbitrate." *Byrd*, 470 U.S. at 221. This Court also rejects rules that "res[t] on a suspicion of arbitration," as such views have "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

Section 2 of the Act requires state and federal courts to enforce arbitration agreements as they would any other contract. *See* 9 U.S.C. § 2; *Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2 . . . embodies a clear federal policy of requiring arbitration . . ."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (the FAA "make[s] arbitration agreements as enforceable as other contracts"). Section 2 also contains a narrow "saving clause." The clause provides that an arbitration agreement can be invalidated under state law only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a state-law rule would invalidate an arbitration agreement, but that rule does not "exist at law or in equity for the revocation of any contract," the state-law rule is pre-

empted by § 2 of the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (FAA is "pre-emptive of state laws hostile to arbitration").

This Court has broadly construed § 2's preemptive sweep. Of course, state laws that on their face invalidate arbitration agreements are preempted. *See, e.g., Perry v. Thomas*, 482 U.S. at 484 (FAA preempts California statute allowing wage-collection actions to proceed "without regard to the existence of any private agreement to arbitrate"). Also preempted are state laws that on their face impose special conditions on the enforcement of arbitration agreements. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts Montana law requiring that notice of arbitration be typed in underlined capital letters). Of special relevance here, even state-law rules that do not on their face refer to arbitration are preempted *if* they are applied in an arbitration-specific manner. In *Perry*, for instance, the Court clarified that a general state-law principle – like unconscionability – is preempted by § 2 if its application "takes its meaning precisely from the fact that a contract to arbitrate is at issue." 482 U.S. at 492 n.9. "A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable. . . ." *Id.*; *see also Doctor's Assocs.*, 517 U.S. at 697 n.3 (quoting *Perry*).

B. Factual Background

In the landmark decision of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that statutory claims for employment discrimination could be compelled into arbitration pursuant to mandatory pre-dispute arbitration agreements. In 1995, following *Gilmer* and its progeny, Circuit City implemented a mandatory pre-dispute arbitration program, the Associate Issue Resolution Program,

through which Circuit City and its Associates[3] agree to arbitrate any and all employment-related legal disputes arising between them. Since its implementation, all prospective applicants for employment must agree to participate in this program as a condition of having their job application considered by Circuit City.

On September 9, 1996, as part of the job application process, Catherine Ingle signed a Circuit City "Dispute Resolution Agreement" or "DRA." Circuit City hired Ingle as a Sales Associate in September 1996. During her employment with Circuit City, Ingle requested and was granted several leaves of absence under Circuit City's short-term disability leave policy. Ingle requested and was granted a final short-term disability leave in March 1998, from which she never returned. Ingle's employment was formally terminated in January 1999.

On June 21, 1999, notwithstanding the DRA, Ingle filed suit against Circuit City in the Southern District of California. She asserted several employment-related claims for harassment, discrimination and retaliation under state and federal law, all of which fall squarely within the DRA.

C. Proceedings Below

1. Circuit City filed a motion to compel arbitration. The district court denied the motion, relying on *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 (9th Cir. 1998). In *Duffield*, the Ninth Circuit held that claims under Title VII could not be compelled into arbitration pursuant to a mandatory pre-dispute agreement. Noting that Circuit City's arbitration agreement covered Title VII claims, the

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[3] Circuit City refers to all applicants and current and former employees as "Associates."

district court found the DRA unenforceable under *Duffield*. *See* App. 28a.[4]

2. Circuit City appealed. Prior to any briefing or hearing, the Ninth Circuit dismissed the appeal "for lack of jurisdiction," holding that the FAA did not apply to employment arbitration agreements. App. 27a. After this Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that the FAA does in fact apply to employment contracts, this Court granted a petition for a writ of certiorari in Ingle's case, and vacated and remanded the Ninth Circuit's decision. *See* 532 U.S. 938 (App. 26a).

3. On remand, the Ninth Circuit once again refused to enforce the DRA. This time, the court held that the entire arbitration agreement is unconscionable – and therefore unenforceable – under California law.

The court began by explaining that a contract is invalid under California law if it is both procedurally and substantively unconscionable. App. 6a-7a. According to the Ninth Circuit, procedural unconscionability occurs where there is an "inequality of bargaining power between the parties [that] precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract." App. 7a. On that ground alone, the court found the DRA procedurally unconscionable: "Because of the stark inequality of bargaining power between Ingle and Circuit City, we conclude that [the DRA] is procedurally oppressive." App. 8a. Of course, this rule would apply in almost all employment situations.

Substantive unconscionability, the Ninth Circuit continued, occurs where the "terms of the agreement . . . are so one-sided as to shock the conscience." App. 10a (citation

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[4] The Ninth Circuit recently overruled *Duffield* in *EEOC v. Luce, Forward, Hamilton & Scripps*, 2003 WL 22251382 (9th Cir. Sep. 30, 2003) (en banc).

and internal quotation marks omitted). The court found the DRA to be "one-sided" because *in practice* it would bind only employees, and not employers, to arbitrate their employment-related claims. App. 12a-13a. In the Ninth Circuit's view, it does not matter whether the text of the agreement commits employers as well as employees to arbitration. The mere fact that the agreement is between an employer and an employee means that it is so "one-sided" as to be substantively unconscionable:

> [Where an] arbitration agreement subjects [an employer] to the same terms that apply to its employees . . . the agreement is one-sided anyway. Because the possibility that [an employer] would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way . . . . The only claims realistically affected by an arbitration agreement between an employer and an employee are those claims employees bring against their employers.

App. 12a.[5]

In short, the court below established an entirely new rule of substantive unconscionability law: an employment arbitration agreement is one-sided and hence unconscionable, regardless of its express terms, if its *effect* will be felt primarily by employees because their employer has few claims to arbitrate. Moreover, the Ninth Circuit's new doctrine presumes that *all* employment arbitration agreements will have this prohibited effect in practice:

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[5] Because the Ninth Circuit's holding expressly applies *regardless* of the actual terms of an arbitration agreement, it is irrelevant which version of the DRA is in effect in a particular case. App. 4a (discussing version of DRA at issue); *id.* ("our holdings . . . likely extend beyond this particular version" of the DRA); *see Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003) (applying *Ingle* to a revised DRA that expressly confirms that both Circuit City and Associates must arbitrate their claims).

> [A] contract to arbitrate between an employer and an employee . . . raises a *rebuttable presumption* of substantive unconscionability. Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral . . . with respect to a particular employee, courts should presume such contracts are substantively unconscionable.

App. 13a (emphasis added). In fact, the presumption established below may be "rebuttable" in name only: the court declined to remand the case to give Circuit City any opportunity to demonstrate the requisite bilateral "effect." *See also Mantor*, 335 F.3d at 1108-09 (declining to remand to permit rebuttal of presumption).[6]

Taken together, the Ninth Circuit's holdings on procedural and substantive unconscionability effectively establish a new rule that all mandatory employment arbitration agreements are presumptively unconscionable. Virtually all mandatory employment arbitration agreements will suffer from the defect that the court below labeled procedural unconscionability: an inequality of bargaining power between employer and employee. In addition, according to the court below, all employment arbitration agreements may be *presumed* to be one-sided in actual effect and hence substantively unconscionable. App. 13a, n.10 (coverage of employment arbitration agreements is "typically and grossly one-sided"). In the Ninth Circuit, mandatory employment arbitration agreements are now presumptively unenforceable.

While the Ninth Circuit went on to discuss other aspects of the agreement that it considered to be substantively unconscionable, App. 14a-23a, the actual *holding* of the court

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[6] Had the Ninth Circuit remanded the case, Circuit City would have presented evidence that the company has initiated *more than fifty* arbitrations against Associates over a variety of employment-related legal disputes.

was that the one-sided effect of the agreement – regardless of its express terms – is the sole and sufficient factor rendering the DRA substantively unconscionable: "Circuit City's arbitration agreement expressly limits its scope to claims brought by employees, *which alone* renders it substantively unconscionable. Even if the limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitrate only employee-initiated actions. . . . *Therefore*, we conclude that the coverage of the arbitration agreement is substantively unconscionable." App. 14a (emphasis added).[7]

4. Circuit City argued below that the court's use and invocation of the doctrine of unconscionability "singles out arbitration provisions for suspect status" and is therefore preempted by the FAA. App. 6a, n.3. The Ninth Circuit rejected that argument in short order: "Because unconscionability is a generally applicable defense to contracts, . . . courts may refuse to enforce an unconscionable arbitration agreement." App. 5a.

SUMMARY OF ARGUMENT

1. The lower courts are divided on the proper standard for preemption under § 2 of the FAA. In the Ninth Circuit (along with the Second Circuit and the California Supreme Court), a state-law rule that is a "generally applicable" doctrine automatically is exempt from preemption under § 2, even where application of the doctrine is hostile and specific to arbitration. In other courts, even a state-law rule that can be classified as "generally applicable" – like the doctrine of unconscionability – still may not be applied in an arbitration-

[7] The court then stated that "[t]his holding – assuming procedural unconscionability – would suffice to render this agreement unconscionable, but we elect to address other substantive terms of Circuit City's arbitration agreement." App. 14a, n.11. In other words, the court's discussion of the remaining aspects of the DRA is dicta.

specific manner to invalidate arbitration agreements. The latter standard is the correct one, and it leads to a different outcome in this case. The unconscionability law applied below, which creates a presumption against the enforcement of employment arbitration agreements, is obviously arbitration-specific and hence preempted by the FAA.

2. Resolving this conflict and reversing the decision below is of critical importance. This Court repeatedly has held that preemployment arbitration agreements are valid and enforceable under the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA applies to arbitration agreements between employer and employees); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employees may be required, as condition of employment, to submit statutory discrimination claims to arbitration). Those decisions are rendered meaningless if a court can opt out of the FAA's mandate simply by invoking some version of state-law "unconscionability" doctrine. Indeed, the Ninth Circuit's broad and sweeping use of unconscionability permits a court to effectively opt out of the FAA entirely. This Court's intervention is necessary if the FAA and this Court's precedents are to have any continuing vitality.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S STANDARD FOR PREEMPTION UNDER THE FAA CONFLICTS WITH THE STANDARD USED BY OTHER COURTS.

A. The Ninth Circuit's Use Of Unconscionability To Void Arbitration Agreements.

"Unconscionability" is not the first tool the Ninth Circuit has used to invalidate arbitration contracts. In *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), the Ninth Circuit, contrary to the unanimous view of eleven other federal courts of appeals, held that the FAA does not extend to any contracts for employment. *See Circuit City*

Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (collecting cases); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (Cox and Tjoflat, JJ.); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-36 (8th Cir. 1997). In *Adams*, this Court reversed, holding that the FAA does indeed apply to contracts between employers and employees (excepting only the contracts of those employed as transportation workers). 532 U.S. at 109. This Court then remanded to the Ninth Circuit the *Adams* case and similar decisions, including the instant case, that had relied upon the Ninth Circuit's erroneous holding in *Adams*.

Faced with this Court's decision in *Adams*, the Ninth Circuit found a new basis for repudiating employment arbitration agreements. In both *Adams* and this case, both before the Ninth Circuit for the second time, the court invalidated the arbitration agreements in question, relying on the alternative ground of state unconscionability law. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); App. at 25a.[8]

The Ninth Circuit previously had rejected just this kind of unconscionability argument, holding that the FAA preempts the use of state-law unconscionability doctrine to invalidate arbitration agreements. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988); *Bayma v. Smith Barney*, 784 F.2d 1023, 1025 (9th Cir. 1986). Six months after this Court's opinion in *Adams*, however, the Ninth Circuit reversed course, holding an arbitration agree-

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[8] *Compare Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (declining to use alternate grounds to invalidate arbitration agreement after initial ground reversed by Supreme Court: "the last time this case was before us we made the mistake of giving too little weight to the FAA's pro-arbitration policy," and "[w]e decline to make the same mistake again"); *Thomas v. Perry*, 200 Cal.App.3d 510, 514-15 (Ct. App. 1988) (rejecting alternate ground for invalidating arbitration agreement after initial ground reversed by Supreme Court).

ment unconscionable under state law and expressly overruling its prior precedent. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 941-42 (9th Cir. 2001) (overruling *Cohen* and *Bayma*). Within the next two years, the Ninth Circuit would invalidate another half-dozen arbitration agreements (including the one below) on state-law unconscionability grounds. *See Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) ; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (App. 2a-25a) (opinion below); *Domingo v. Ameriquest Mortgage Co.*, 2003 WL 21675550 (9th Cir. 2003) (unpublished); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002); *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002).

B. A Split Exists Among The Lower Courts On The Standard For Preemption Under Section 2 Of The FAA.

1. In the Ninth Circuit, so long as a state-law rule applies generally to all contracts, and not *solely* to arbitration clauses, it is automatically immune from preemption under § 2. *See* App. 5a-6a & n.3; *see also Ting*, 319 F.3d at 1150 n.15 ("Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."); *Ticknor*, 265 F.3d at 937 ("as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA"). The court does not ask whether a state-law rule has been applied in an arbitration-specific manner, but only whether a state-law rule can be classified, on its face, as one of general applicability. If it can, then it may be used to bar enforcement of an arbitration agreement.

The Ninth Circuit is not alone in taking this position. The Second Circuit and the California Supreme Court have

adopted the same approach. In all three of these courts, a rule that extends to all contracts is *per se* enforceable under § 2 of the FAA, regardless of whether a particular application depends entirely on the fact that an agreement to arbitrate is at issue. According to these courts, a state-law rule is preempted under § 2 only if, on its face, it is limited to certain types of contracts or contract provisions. *See, e.g., Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001) (FAA preempts state statute invalidating out-of-state forum selection clauses in franchise agreements because it applies only to certain provisions of certain contracts); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998) (same); *Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669 (Cal. 2000) (FAA does not preempt state unconscionability doctrine "[b]ecause unconscionability is a reason for refusing to enforce contracts generally").

2. Contrary to these courts, other jurisdictions hold that the mere invocation of a generally applicable rule like "unconscionability" does not end the inquiry into preemption under § 2. Rather, the First and Third Circuits, along with the Alabama Supreme Court, hold that a state-law rule of general applicability is preempted where its application in a particular case singles out, or is specific to, the arbitration context. *See Securities Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1120-21 (1st Cir. 1989); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 182 (3d Cir. 1999); *Ex parte McNaughton*, 728 So.2d 592, 598 (Ala. 1998).

The conflict with the decision below is most obvious in *Ex parte McNaughton*.[9] In *McNaughton*, the plaintiff claimed that an arbitration agreement was unconscionable under state law because only one party to the agreement was

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[9] The California Supreme Court expressly acknowledged a split with *McNaughton*. *See Armendariz*, 6 P.3d at 692 (recognizing conflict with Alabama Supreme Court).

bound to arbitrate and thus waive its right to trial by jury. The Alabama Supreme Court held that such an application of state-law unconscionability doctrine would be arbitration-specific, in that it "depends [] for its application" on the premise that a party is specially disadvantaged by being deprived of a jury trial and relegated to arbitration. 728 So.2d at 598 ("Although the doctrine of unconscionability/mutuality of remedy purportedly could apply in the non-arbitration context . . . it directly depends on arbitration for its application."). As a result, the court concluded, that application of state-law unconscionability doctrine would be preempted under § 2. *Id.* ("[T]his approach [to unconscionability] assigns a suspect status to arbitration agreements. Doing so flies in the face of *Doctor's Associates*, 517 U.S. at 687 . . .").

In *Harris*, the Third Circuit, like the Alabama Supreme Court, held that § 2 preempted application of state unconscionability law. At issue in *Harris* was a claim that an arbitration clause was unconscionable under state law because it appeared in fine print on the back of standard form contract. Despite the fact that the doctrine of unconscionability is generally applicable – a fact that would have been dispositive in the Ninth Circuit – the court held that application of the state law in this context was precluded by *Doctor's Associates*, 517 U.S. at 687, under which "courts may not invalidate arbitration agreements under state laws that single out the provisions of arbitration agreements for suspect status." 183 F.3d at 182-83.

The First Circuit has come to the same conclusion: a state-law rule may not be used to invalidate an arbitration agreement if its application reflects the view that arbitration agreements are specially suspect. In *Connolly*, the court held that a state regulation singling out arbitration agreements for special restrictions was preempted under § 2 – an uncontroversial holding – but went on to make clear that the result

would be the same even if the regulation were on its face generally applicable. As the court explained, a rule that purports to protect against contracts of adhesion generally may not rest on concerns about arbitration agreements in particular. 883 F.2d at 1121 (state "may not say (judicially, legislatively, or in a regulatory mode) that 'adhesion contracts are especially bad when arbitration is included'").

C. The Conflict Among The Lower Courts Is Outcome Determinative.

This case would be decided differently – and the arbitration agreement enforced – under the standard applied in the First and Third Circuits and the Alabama Supreme Court. In those courts, the fact that a state-law rule is a species of the generally applicable unconscionability doctrine is not dispositive. What matters is whether the state-law rule is used in an arbitration-specific manner: whether it "directly depends on arbitration for its application," *McNaughton*, 728 So.2d at 598, or "single[s] out the provisions of arbitration agreements for suspect status," *Harris*, 183 F.3d at 183, or says that "adhesion contracts are especially bad when arbitration is involved," *Connolly*, 883 F.2d at 1121.

The rule applied below is arbitration-specific in the sense described by *McNaughton*, *Harris*, and *Connolly*, and thus preempted. The rule of state-law unconscionability at issue here has two parts. First, the Ninth Circuit conclusively presumes that unequal bargaining power renders all preemployment arbitration agreements contracts of adhesion. Those agreements thus are procedurally unconscionable, because the employee has no choice but to accept the terms of the contract. *Supra* at 7. California law, however, generally does not deem a "take it or leave it" contract procedurally unconscionable *unless* the weaker party truly has no alterna-

tive in the marketplace.[10] Only for preemployment arbitration agreements does the Ninth Circuit completely disregard the alternatives for employment that exist elsewhere. Second, the Ninth Circuit adopts a (purportedly rebuttable) presumption that all preemployment arbitration agreements are substantively unconscionable because in practice – and regardless of their actual terms – they will bind employees but not employers. *See supra* at 8-9. Circuit City has identified no California case law applying the same "one-sided effects" test to any agreement outside of the employment arbitration context. Nor, in any event, does California contract law outside the arbitration context require mutuality of obligation as a pre-condition for enforcement of a contract.[11]

When the two parts – procedural and substantive – are considered together, the arbitration-specific nature of the rule applied below becomes even more manifest. The Ninth Cir-

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[10] *See, e.g., Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1185-86 (Cal. 1976) (health insurance contract with arbitration agreement not a contract of adhesion where plaintiff could have sought insurance elsewhere); *Steven v. Fidelity & Cas. Co.*, 377 P.2d 284, 297 n.11 (Cal. 1962) (agreement not contract of adhesion unless stronger party "has a monopoly (natural or artificial) or because all competitors use the same clauses"); *Freeman v. Wal-Mart Stores, Inc.*, 3 Cal. Rptr. 3d 860, 867 (Ct. App. 2003) (terms not a "take-it-or-leave-it situation" because plaintiff "could simply decline" to enter into agreement and make alternative arrangements); *Cubic Corp. v. Marty*, 229 Cal. Rptr. 828, 833-34 (Ct. App. 1986) (invention agreement is not a contract of adhesion where weaker party has an "opportunity to look elsewhere for a more favorable contract").

[11] *See, e.g., Principal Mut. Life Ins. Corp. v. Vars, Pave, McCord & Freedman*, 77 Cal. Rptr. 2d 479, 490 (Ct. App. 1998) (mortgage agreement provision enforceable despite unilateral nature; "Where sufficient consideration is present, mutuality is not essential."); *Hillsman v. Sutter Cmty. Hosps.*, 200 Cal. Rptr. 605, 611 (Ct. App. 1984) (employment contract enforceable despite unilateral nature; "If the requirement of consideration is met, there is no additional requirement . . . of equivalence in the values exchanged, or 'mutuality of obligation.'") (citation and internal quotation marks omitted).

cuit's new rule amounts to a presumption that all preemployment arbitration agreements are unconscionable and therefore unenforceable. To state the rule is to prove the point; by its own terms, the rule is indisputably arbitration-specific. Furthermore, the rule is arbitration-specific in the worst way, resting on a "broad concern" about the equities of employment arbitration agreements, App. 12a, and specifically about the requirement that employees "waive their right to seek redress in the judicial forum," App. 9a. Whether or not those concerns are well-founded – and this Court has held that they are not, *see infra* at 20-21 – they undeniably reflect precisely the kind of judicial hostility to arbitration that the FAA was enacted to overcome. *See Adams*, 532 U.S. at 122-23 ("[F]or parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."); *Gilmer*, 500 U.S. at 31 (noting the "simplicity, informality, and expedition of arbitration") (citation and internal quotation marks omitted).[12]

D. The Ninth Circuit's Newly-Created Standard is Incorrect.

The holding below is not only in conflict with decisions of other courts, but also is incorrect. In *Perry v. Thomas*,

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[12] The mere fact that unconscionability is applied to an arbitration agreement does not mean that the doctrine is being applied in an arbitration-specific manner. Rather, the application of the doctrine is arbitration-specific when the only reason the contract is held unconscionable turns entirely on the fact that the contract involves arbitration. In other words, if the application of the rule has no meaning outside the arbitration context – as with the Ninth Circuit's holding that employment arbitration agreements are presumptively invalid – then the application is arbitration-specific. As *Perry* explained, unconscionability cannot be applied in a manner that "takes its meaning precisely from the fact that a contract to arbitrate is at issue." 482 U.S. at 492-93 n.9.

supra, the Court considered almost precisely the question presented here: may state-law unconscionability doctrine be applied to invalidate an arbitration agreement consistent with § 2? The answer was not, as the Ninth Circuit would have it, that unconscionability law is automatically exempted from preemption under § 2 on the grounds that it is generally applicable to all contracts. Instead, an application of state-law unconscionability doctrine *may* be preserved under § 2's saving clause – but only if that specific application "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. at 492-93 n.9. By contrast, an application of state-law unconscionability doctrine that "takes its meaning precisely from the fact that a contract to arbitrate is at issue" is preempted. *Id.*

The Court made the same point in *Doctor's Associates*, *supra*, in the course of reviewing a state-law notice provision for arbitration agreements. The Court specifically rejected the argument that the notice requirement would be saved from preemption if it were phrased as an arbitration-neutral "illustration of a cross-the-board rule" against adhesion contracts. 517 U.S. at 687 n.3. Even the doctrine of unconscionability may be preempted, the Court explained, if a court "rel[ies] on the uniqueness of an agreement to arbitrate as the basis for a state-law holding that enforcement would be unconscionable." *Id.* (quoting *Perry*, 482 U.S. at 493 n.9).

The opinion below (and the decisions of the Second Circuit and the California Supreme Court) cannot be squared with this Court's statements in *Perry* and *Doctor's Associates*. Nevertheless, these lower courts brush aside this Court's decisions, creating a lower court conflict that is broad and persistent and which leads to the wrong result: the invalidation of arbitration agreements based on the hostile and specific application of a generally applicable state-law

doctrine. The Court should grant review to resolve the conflict and insist on proper enforcement of § 2.[13]

II. THE DECISION BELOW UNDERMINES THIS COURT'S DECISIONS AND THE FAA, AND REQUIRES THE COURT'S IMMEDIATE ATTENTION.

1. In decisions like *Gilmer* and *Adams*, this Court clearly stated that mandatory preemployment arbitration agreements are subject to the enforcement provisions of the FAA. The decision below, on the other hand, effectively renders employment arbitration agreements *unenforceable* under an arbitration-specific application of state-law unconscionability doctrine. If that decision is allowed to stand, then *Gilmer* and *Adams* will be deprived of any practical meaning whenever a court can find a state-law rule that can be pressed into service to invalidate an employment arbitration agreement.

Both *Gilmer* and *Adams* expressly reject arguments against employment arbitration agreements that rest on concerns about an asserted lack of fairness in the arbitration process – and in particular, an asserted lack of fairness to employees. In *Gilmer*, for instance, the Court enforced an arbitration agreement signed as a condition of employment over objections arising from the inequality of bargaining power between employer and employee. Such "generalized

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[13] A similar question was presented in *Cigna Corp. v. Leodori*, No. 02-1680, *cert. denied* Oct. 6, 2003. *Leodori*, however, was a poor vehicle for addressing the question presented. First, because the case arose out of a state court, at least some members of this Court would not have applied the FAA at all. *See Doctor's Assocs.*, 517 U.S. at 689 (Thomas, J., dissenting) ("I remain of the view that § 2 of the Federal Arbitration Act . . . does not apply to proceedings in state courts."). Second, in *Leodori* the state-law rule that invalidated an arbitration agreement was not as clearly arbitration-specific as the rule imposed by the Ninth Circuit in this case. Accordingly, it was not clear in *Leodori* whether the proper § 2 preemption standard would have made a difference to the outcome in that case.

attacks on arbitration," the Court held, are inconsistent with the "federal policy favoring arbitration" in employment as in other areas, and therefore "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 25, 30, 33. In *Adams*, the Court was required to reaffirm that the FAA applies in the employment context – and again to "reject[] the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." 532 U.S. at 123. Indeed, the Court recognized that "for parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions." *Id.* at 122-23.

The decision below is predicated precisely on the "suspicion" of mandatory employment arbitration agreements, *Gilmer*, 500 U.S. at 27, repudiated by the Court in *Gilmer* and *Adams*. The Ninth Circuit expressly acknowledged its "broad concern with respect to arbitration agreements between employers and employees." App. 12a. That concern manifested itself in a holding that unequal bargaining power between employers and employees, by itself, renders such agreements procedurally unconscionable – precisely the anti-arbitration argument rejected in *Gilmer*. Furthermore, the court below held that it "shocks the conscience" when an arbitration agreement operates *in practice* to bind employees but not employers. Requiring an employee to arbitrate is "unfair," however, only if arbitration itself is considered unfair or disadvantageous. At its core, then, the decision below rests on the view that arbitration is itself unfair or undesirable – precisely the judgments that this Court and Congress have rejected. If a court can bypass *Gilmer* and *Adams* simply by invoking the term "unconscionability," then those decisions become a dead letter.

2. The question presented in this case – whether an arbitration-specific application of a generally applicable state-

law rule is preempted under § 2 of the FAA – is all the more critical because of the broader implications it has for the enforcement of *all* arbitration agreements, not just those in the employment context. Section 2 requires courts to enforce arbitration agreements, notwithstanding state substantive or procedural rules to the contrary, but for a narrow exception for state-law rules that apply to "any contract." The decision below construes the narrow exception so that it swallows the rule, opening a hole in the FAA big enough to encompass any application of state unconscionability doctrine no matter how arbitration-specific in application.

Such a sweeping rule converts state contract law into a license to opt out of the FAA entirely. As its recent arbitration-related docket attests, this Court has devoted substantial resources to elucidating the contours of the FAA and to enforcing the FAA's pro-arbitration mandate.[14] This Court's efforts will be for naught if courts can sidestep the FAA altogether by wielding doctrines like "unconscionability" to invalidate arbitration agreements under state law. The Ninth Circuit has done precisely that in this case and others like it. The question presented here goes to the very core of whether the FAA and arbitration agreements can and will be enforced, and the Court should step in now to resolve the issue.

Indeed, the Ninth Circuit *already* has so capaciously construed the unconscionability doctrine that it invalidates virtually any employment arbitration agreement. It does not matter which state law governs: the Ninth Circuit invalidates

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[14] *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003); *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003); *PacifiCare Health Sys. v. Book*, 123 S.Ct. 1531 (2003); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

arbitration agreements under California law (*Mantor*, *Ingle*, *Ting*, *Ferguson*, and *Adams*), under Montana law (*Ticknor*), and under Hawaii law (*Domingo*). Nor does it matter which company is involved: Circuit City (*Mantor*, *Ingle*, *Adams*), AT&T (*Ting*), or some other company (*Domingo*, *Ferguson*, *Ticknor*). While the court below relied exclusively on one contractual provision to invalidate the DRA, the Ninth Circuit's cases nevertheless deem all manner of provisions to be substantively unconscionable: more limited discovery in arbitration;[15] agreements that either by terms or effect cover the claims of one party, but not the other;[16] agreements that grant one side the unilateral power to modify or terminate the agreement;[17] forum selection clauses;[18] and statutes of limitations.[19] Provisions considered and judged acceptable by the vast majority of courts also fall under the Ninth Circuit's scrutiny. According to the Ninth Circuit, for instance, prohibitions on class actions are unconscionable and invalid. Yet, five other courts of appeals enforce express prohibitions on class actions.[20] The Ninth Circuit also holds that cost-

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[15] *Domingo*, 2003 WL 21675550 at *1; *Ferguson*, 279 F.3d at 786.

[16] *Mantor*, 335 F.3d at 1108-09; *Domingo*, 2003 WL 21675550 at *2; *Ingle*, 328 F.3d at 1173-75 (App. 10a-14a); *Ting*, 319 F.3d at 1149; *Ferguson*, 298 F.3d at 784-85; *Adams*, 279 F.3d at 893-94; *Ticknor*, 265 F.3d at 940.

[17] *Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1179 (App. 22a-23a).

[18] *Domingo*, 2003 WL 21675550 at *1.

[19] *Ingle*, 328 F.3d at 1175 (App. 14a-15a); *Adams*, 279 F.3d at 894.

[20] *Compare Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1175-76 (App. 15a-17a); *Ting*, 319 F.3d at 1150 (Ninth Circuit cases invalidating prohibitions on class actions), *with Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Burden v. Check Into Cash*, 267 F.3d 483, 492 (6th Cir. 2001); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (all enforcing express class action prohibitions). California courts,

sharing provisions are categorically invalid – a view contrary to that of ten other federal courts of appeals, all of which have concluded that this Court's decision in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), precludes such a categorical rule.[21] Even provisions permitting motions for summary judgment "shock the conscience" of the Ninth Circuit.[22] In the Ninth Circuit's view, virtually every employment arbitration agreement – or simply every arbitration agreement – can be invalidated under the standard imposed below. Such a result would eviscerate the pro-arbitration policy articulated by Congress in the Federal Arbitration Act. This Court's intervention is necessary to preserve the very core of the FAA.

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too, are divided on this issue of whether holding such a provision unconscionable is a rule preempted by FAA § 2. *Compare Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100-02 (Ct. App. 2002) (invalidating agreement on this ground), *with Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Ct. App. 2003) (use of unconscionability to invalidate agreement's bar on class action is preempted). The court below, however, simply brushed aside the contrary authority, App. at 17a, n.15, and failed to mention that the California Supreme Court had, one month earlier, granted review to resolve the split, *see* 65 P.3d 1285 (Cal. 2003).

[21] *Compare Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1177-78 (App. 19a-21a); *Ting*, 319 F.3d at 1151; *Ferguson*, 298 F.3d at 785; *Adams*, 279 F.3d at 894 & n.5 (Ninth Circuit decisions holding cost-sharing provisions *per se* invalid), *with Rosenberg v. Merrill Lynch*, 170 F.3d 1, 15-16 (1st Cir. 1999); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Williams v. CIGNA Fin. Advisors Inc.*, 197 F.3d 752, 763-65 (5th Cir. 1999); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658-59 (6th Cir. 2003); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 n.9 (8th Cir. 2001); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1259 (11th Cir. 2003); *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 823 (D.C. Cir. 2001).

[22] *Domingo*, 2003 WL 21675550 at *1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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